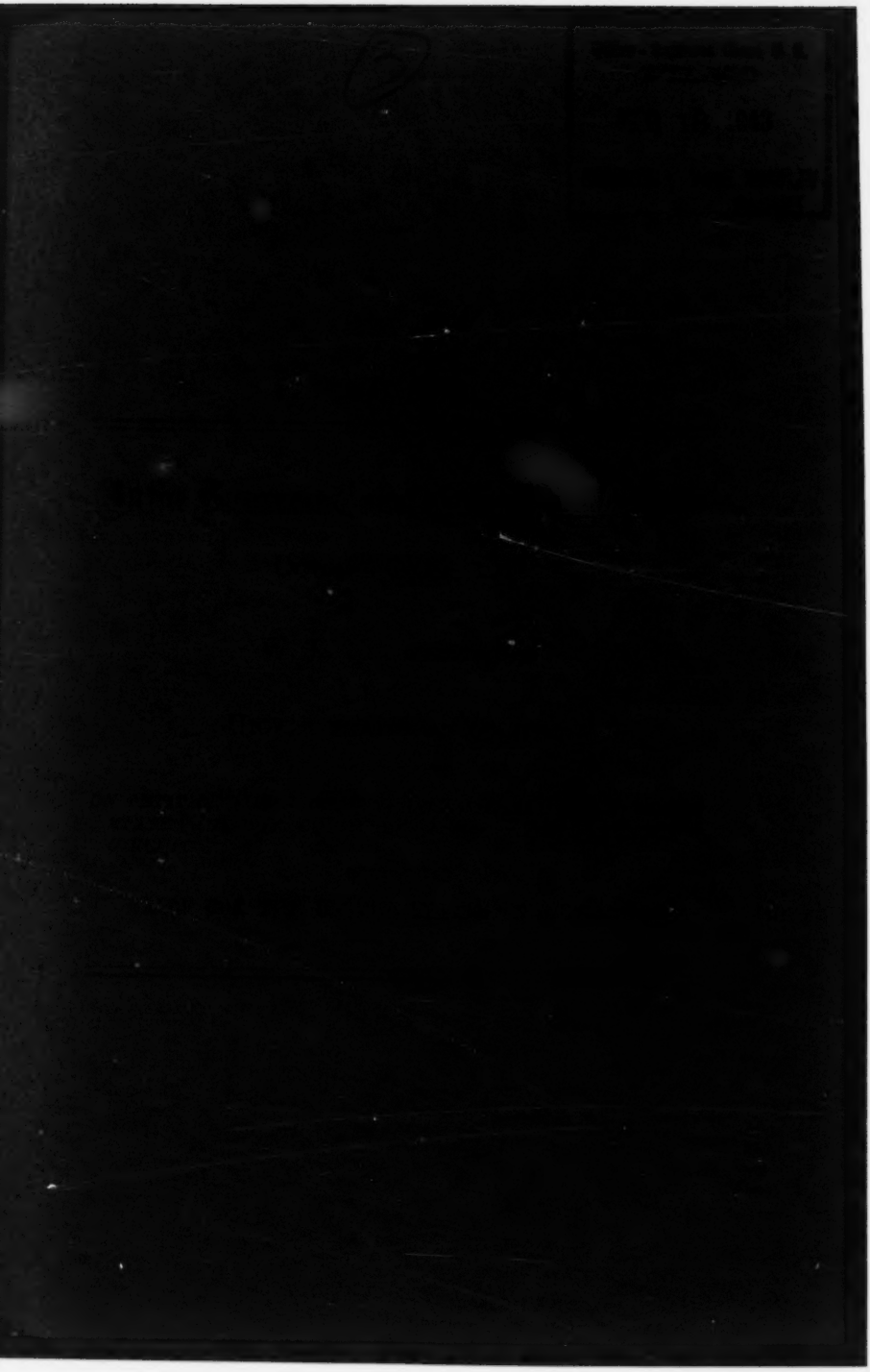

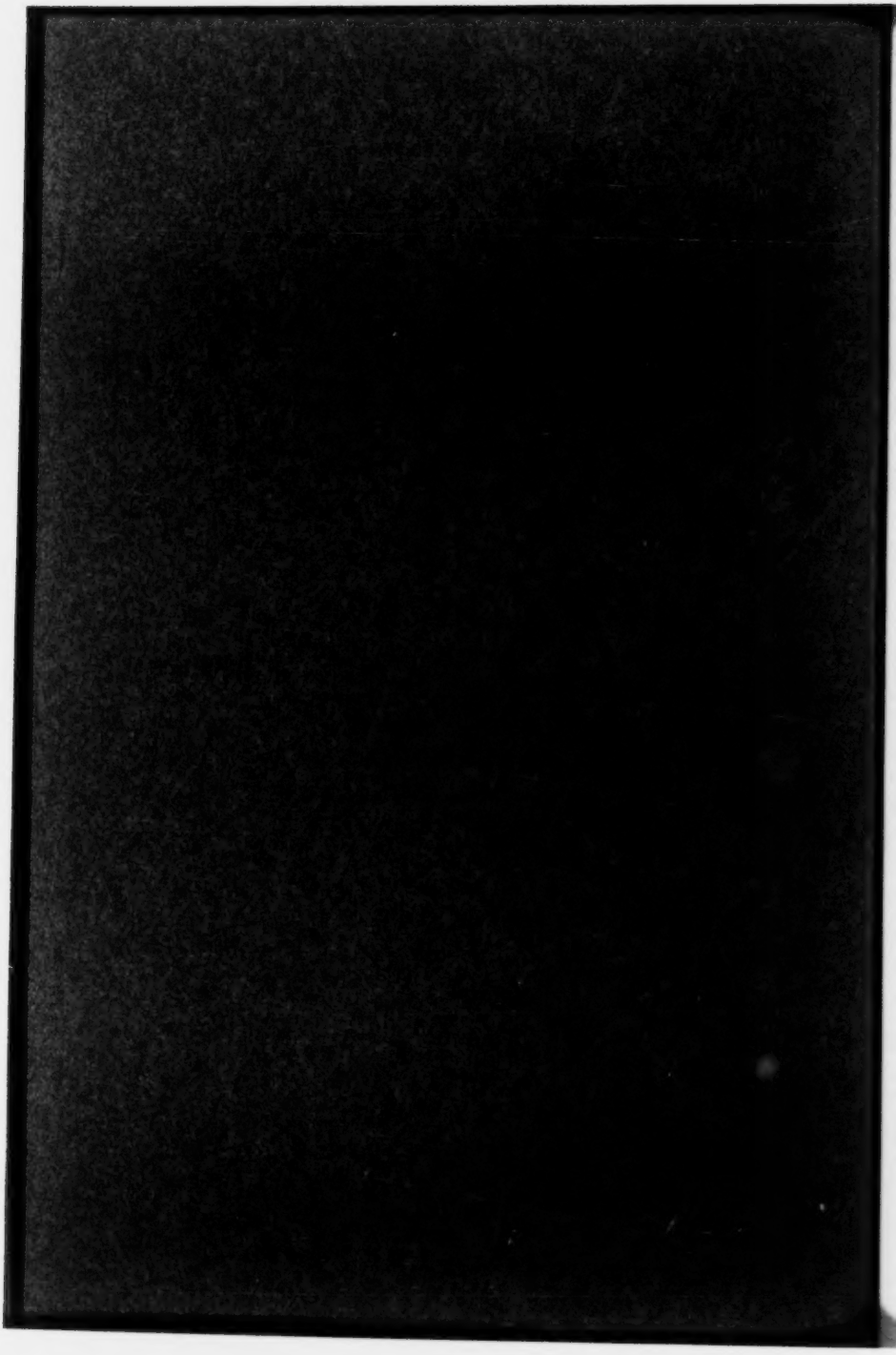

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CITATIONS

511477—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 664

W. L. NIX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals is reported in 131 F. (2d) 857. The district court rendered no opinion.

JURISDICTION

The order of the circuit court of appeals dismissing the appeal was entered November 21, 1942. A petition for rehearing was denied December 23, 1942. The petition for a writ of certiorari was filed January 20, 1943. The juridiction of this Court is invoked under Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether on appeal from an order revoking probation the defendant may secure reversal of the judgment of conviction, entered four years earlier, for errors during the trial.

STATUTE INVOLVED

Act of March 4, 1925, c. 521, 43 Stat. 1259, as amended by the Act of June 16, 1933, c. 97, 48 Stat. 256:

> SEC. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.
>
> At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest, which warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be

so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

STATEMENT

Petitioner was named defendant in two bills of indictment returned on February 16, 1937, in the Northern District of Texas on charges of attempting to defeat and evade gasoline excise taxes and wilfully failing to pay those taxes in violation of Section 1114 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116.[1] The indictments, containing 34 counts in all, were consolidated. Petitioner was tried before a jury and was found guilty on

[1] No record has been filed by petitioner. Since, for reasons stated in the Argument, the court below had no jurisdiction to consider the questions sought to be raised by the appeal, we have considered it unnecessary to attempt to procure and make up a record showing the proceedings. The above Statement is taken from the petition and the opinion below.

all counts on June 16, 1937. On June 21, 1937, he was sentenced to pay a fine aggregating $10,000 on the even numbered counts and to a term of five years' imprisonment at Leavenworth Penitentiary on the odd numbered counts. The court suspended the prison sentence and placed the petitioner on probation for a period of five years, subject to the conditions, first, of good behavior, second, that half of the fine be paid within ninety days and the balance within eighteen months, and, third, that the taxes due the Government be paid within eighteen months.

Petitioner filed a notice of appeal on June 26, 1937, but abandoned that appeal.

Petitioner failed to comply with the usual conditions of probation and became a fugitive from justice. In April 1942 he was apprehended and on April 23, 1942, he was brought before the district court. The court, upon a proper showing that petitioner had complied with none of the conditions of probation, revoked the probation, reduced the term of imprisonment from five to two years, and ordered petitioner committed.

On April 24, 1942, petitioner filed notice of appeal to the Circuit Court of Appeals for the Fifth Circuit, and moved to prosecute the appeal *in forma pauperis*. The only grounds of appeal stated in the notice were rulings at the original trial which ended in the judgment entered more than four years before. The circuit court of appeals held that the appeal was without merit,

denied the motion to prosecute *in forma pauperis* and dismissed the appeal.

ARGUMENT

The action of the circuit court of appeals was clearly correct. The judgment entered on June 21, 1937, imposing sentence and placing petitioner on probation, was final and appealable. *Berman* v. *United States,* 302 U. S. 211. Petitioner's appeal, taken on April 24, 1942, was in substance an attempt to appeal from that judgment; the grounds stated in the notice of appeal relate exclusively to the proceedings determining his guilt. But, since the five day period for appeal fixed by Rule III of the Criminal Rules had expired long before the appeal was taken, the judgment of conviction was beyond the jurisdiction of the circuit court of appeals to review. *Miller* v. *United States,* 104 F. (2d) 343 (C. C. A. 5), certiorari denied, 308 U. S. 549; *Burr* v. *United States,* 86 F. (2d) 502 (C. C. A. 7), certiorari denied, 300 U. S. 664; *Dembrofsky* v. *United States,* 86 F. (2d) 677 (C. C. A. 1) ; *Fewox* v. *United States,* 77 F. (2d) 699.

Confined to the order revoking probation, there was no merit in the appeal. Probation is concerned with the rehabilitation of one convicted of crime, and not with the determination of guilt. The considerations involved in granting or revoking probation are entirely apart from any reexamination of the merits of the litigation.

Berman v. *United States, supra,* 213. Consequently, an appeal from an order revoking probation raises only the question whether the discretion of the trial court was abused. *Burns* v. *United States,* 287 U. S. 216, 222–223; *Escoe* v. *Zerbst,* 295 U. S. 490, 492. Petitioner did not contend that an abuse occurred in the instant case; and, of course, on that issue any error in rulings during the trial would be irrelevant.[2]

CONCLUSION

The decision of the court below is in all respects correct. There is presented neither an important question of law nor a conflict of decisions. It is, therefore, respectfully submitted that the petition should be denied.

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FEBRUARY 1943.

[2] We believe that no error occurred and that petitioner's contentions are without merit. However, since there is no jurisdiction and no record, argument upon those points would be inappropriate.

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